DEPARTMENT OF JUSTICE

STATEMENT

OF

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COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

OVERSIGHT OF THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

PRESENTED

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Good afternoon, Mr. Chairman and members of the Task Force. It is a pleasure for me to appear before you today on behalf of the Department of Justice and the dedicated professionals of its Antitrust Division. I thank you for this opportunity to highlight the Division's accomplishments, answer your questions about our work, and listen to your thoughts about sound and vigorous enforcement of the antitrust laws. Mr. Chairman, I also appreciate the active interest and strong support of our law enforcement mission by the Judiciary Committee through the continuing work of the Antitrust Task Force. Antitrust enforcement has enjoyed substantial bipartisan support through the years, and I believe the work of the Task Force will ensure it remains on the right track.

Competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy by helping ensure that anticompetitive agreements, conduct, and mergers do not distort market outcomes. It has helped American consumers obtain more innovative, high-quality goods and services at lower prices, and it has strengthened the competitiveness of American businesses in the global marketplace.

I am pleased to report on some of the recent outstanding accomplishments in the Division. In many areas we have achieved record levels of enforcement, benefiting American consumers and businesses. The first part of my testimony today will review recent developments in the Division's three core enforcement programs: criminal, merger, and civil non-merger. Following that discussion I will describe some ongoing competition policy initiatives at the Antitrust Division aimed at benefiting consumers and businesses and strengthening the foundation for effective antitrust enforcement, both here and around the world.

The Antitrust Division pursues its mission through an enforcement hierarchy that emphasizes pursuing illegal cartels, anticompetitive mergers, and civil non-merger conduct that unreasonably restrains competition or leads to the unlawful creation or abuse of monopoly power. Within each area, the Division strives to identify and pursue vigorously violations of the antitrust laws, to increase transparency so that private parties can better predict our enforcement actions, and to reduce the time and cost associated with our investigations.

Cartel Enforcement

The detection, prosecution, and deterrence of cartel offenses—such as price fixing, bid rigging and market allocation—continue to be the highest priority of the Antitrust Division. There is no plausible procompetitive rationale for this behavior. The Division places particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining record-breaking corporate fines.

The Division has made significant strides in the prosecution of individuals involved in cartel offenses. In this regard, the Division thanks the House Judiciary Committee for its efforts in increasing the criminal fines and statutory maximum sentences for Sherman Act offenses in 2004 as well as in making antitrust offenses a predicate crime for wiretapping authority last year. The most effective way to deter and punish cartel activity is to hold the most culpable individuals accountable and send them

to jail. Antitrust offenders are being sent to jail with increasing frequency and for longer periods. This Committee's efforts will help us continue this important trend that benefits American consumers and businesses.

The Division's cartel enforcement efforts were outstanding for Fiscal Year 2007, which ends this week. The Division set a record for the most total jail time imposed (almost 30,000 jail days); obtained the second highest amount of fines in the Division's history (over $630 million); and succeeded in obtaining the longest jail sentence for a foreign national charged with an antitrust offense (14 months). These accomplishments reflect great strides in the Division's efforts to rid the marketplace of cartels and their harm to consumers.

With respect to particular criminal enforcement efforts in the past year, the Division has focused on three areas of crucial importance to our economy: international cartels, domestic cartels, and contracting and procurement fraud and corruption that subverts the competitive process. What follows is a brief description of some of our most recent and most important criminal prosecutions:

International Cartels

One of the remarkable features of many current international cartel cases is the cooperation and coordination with international competition enforcers that these matters entailed. This is a relatively new and important development in enforcement that increases our ability to protect American consumers from the harms caused by international cartels.

British Airways/Korean Air Lines—On August 1, 2007, the Division charged Korean Air Lines Co., Ltd. with conspiring to fix international cargo rates and conspiring to fix fares charged to passengers and travel agents for flights from the United States to Korea. The Division also charged British Airways Plc with conspiring to fix international cargo rates and conspiring to fix the passenger fuel surcharge for long-haul international air transportation. (I am recused from the British Airways prosecution.) On August 23, both companies pleaded guilty and were sentenced to pay separate $300 million criminal fines, each tying the record for the Division's second largest fine ever. On the same day the Division filed charges, the United Kingdom's Office of Fair Trading announced British Airways had agreed to pay a fine of approximately $246 million for collusion on long-haul passenger fuel surcharges. This was the first time that the Division and the OFT have brought parallel charges. Our investigation is ongoing.

Dynamic Random Access Memory—The Division's continuing investigation of the DRAM cartel has yielded total fines of more than $732 million, and courts imposed over 3,000 days of jail time for individual defendants. On February 14, 2007, a Korean national and current president of Samsung's U.S.-based subsidiary was sentenced to pay a criminal fine of $250,000 and to serve 10 months in jail. In May 2007, another Samsung executive was sentenced to pay a $250,000 fine and to serve fourteen months in prison—the longest prison sentence ever imposed on a foreign national for violating U.S. antitrust laws. Over the course of the investigation, this matter has so far resulted in charges against five companies and 18 individuals, of which 11 are foreign nationals who have served or agreed to serve time in U.S. prisons.

Marine Hose Investigation—In May 2007, eight executives in the marine hose industry who were attending an industry conference in Houston were arrested and charged by criminal complaint with conspiring to rig bids, fix prices, and allocate market shares for marine hose. Marine hose is a flexible rubber hose that is used to transport oil between tankers and storage facilities and buoys. The arrested executives were from the United Kingdom, France, Italy, and Japan. Simultaneous with the arrests, agents of the Defense Criminal Investigative Service (DCIS) of the Department of Defense's Office of Inspector General conducted searches at locations across the U.S. While those searches were being conducted, the Office of Fair Trading in the UK and the European Commission also conducted searches in Europe. On September 13, one of the eight arrested executives and an additional executive were indicted for their participation in the conspiracy.

Domestic Cartels

The Division also continues to vigorously pursue domestic cartels that harm American consumers. One particular domestic cartel enforcement action to note is discussed below.

Ready-Mixed Concrete—The Division has successfully prosecuted price fixing in the ready-mixed concrete industry in the U.S. Midwest. In November 2006, Ma-Ri-Al Corporation and two of its executives were convicted after trial for fixing prices of ready-mixed concrete in Indiana. Each executive was sentenced to serve 27 months in jail, and the company was ordered to pay a $1.75 million fine. In total, four corporations and eight executives have pled guilty to fixing prices of ready-mixed concrete, and jail

sentences of five to fourteen months have been imposed on the pleading executives. Fines imposed in the investigation total over $35 million, including a $29.2 million fine against Irving Materials, Inc., which is the single largest fine imposed for a domestic price-fixing cartel.

Contracting and Procurement Fraud

One important focus of the Division's criminal enforcement efforts in the past year has been fraud and corruption involving bidding, contracting, and procurement. These cases take money out of the pocket of every American taxpayer and deserve severe condemnation. These cases deal with U.S. operations in Iraq, construction in New Orleans following Hurricane Katrina, the U.S. Navy, the Department of Defense, and U.S. schools, among others.

Iraqi Contracting Investigation—As part of the Department's National Procurement Fraud Task Force, the Division filed three cases in July of this year in its investigation of fraud in Iraqi procurement contracts. Three defendants were indicted in August 2007 on bribery, conspiracy, money laundering, and obstruction charges arising out of one of the defendant's service as an Army contracting officer in Kuwait in 2004 and 2005. The defendants allegedly accepted millions of dollars in bribe payments in return for awarding co-conspirator contractors and others DOD contracts through a rigged bidding process. Cash bribes paid to the defendants and other co-conspirators allegedly totaled $9.6 million. All three defendants face up to 20 years in prison and a fine of $500,000 for the charge of money laundering conspiracy, and up to five years in

prison and a fine of $250,000 for each of the conspiracy counts. One defendant also faces up to 15 years in prison and a $250,000 fine on the charge of bribery.

U.S. Navy Contracting—The vice president of a Virginia marine products company agreed in August 2007 to plead guilty, serve a sentence, and pay a criminal fine for his role in a conspiracy to rig bids and allocate customers with respect to certain marine products purchased by the U.S. Navy, the U.S. Coast Guard, and other public and private entities. He participated in a conspiracy between December 2000 and May 2003 to allocate customers and rig bids for contracts to sell plastic marine pilings. He and other conspirators discussed and agreed among themselves which of them would win contracts from the Department of Defense (DOD), the Department of Homeland Security, and others.

In addition, his former supervisor pleaded guilty to multiple felony counts, including charges that he participated in the plastic marine pilings conspiracy, served time in prison, and paid a $100,000 criminal fine. Other executives that have pleaded guilty in this investigation include the company's former chief financial officer, who agreed to plead to two felony counts. He was charged for participating in the bid rigging and customer allocation conspiracy among manufacturers of foam-filled marine fenders and buoys, and was sentenced to 18 months in prison and to pay a $75,000 criminal fine. A fourth executive also pleaded guilty, agreed to serve four months in jail and serve four months in home detention, and to pay a $50,000 criminal fine for his involvement in a related bid-rigging and customer allocation conspiracy.

U.S. Department of Defense Contracting—The president and owner of a Medford, New York defense company pleaded guilty in September 2007 and agreed to pay a

$20,000 criminal fine for participating in a conspiracy to rig bids on military contracts for products that are used to secure cargo on vehicles, vessels and aircraft. In July 2007, a former executive of a Long Island, N.Y., defense company pleaded guilty, agreed to serve 10 months in prison, and will also pay a $10,000 criminal fine for participating in the conspiracy, and for soliciting a kickback in connection with those contracts. In addition, two Pennsylvania executives pleaded guilty in February 2007 and are currently awaiting sentencing.

New Orleans Levee Reconstruction—As part of the Department's Hurricane Katrina Fraud Task Force, the Division secured a guilty plea from a former contract employee of the U.S. Army Corps of Engineers in August 2007. The former contract employee was a construction official in the New Orleans office of the U.S. Army Corps of Engineers. He agreed to plead guilty to bribery in connection with a $16 million hurricane protection project for the reconstruction of the Lake Cataouatche Levee, south of New Orleans. Between August and October of 2006, he agreed to accept cash payments from a sand and gravel subcontractor in exchange for providing confidential information used by the Corps to evaluate bids.

Nationwide E-Rate Investigation—The Division actively is pursuing a nationwide investigation of bid rigging and fraud in the E-Rate program. Congress created the E-Rate program to help economically disadvantaged schools and libraries obtain computer and telecommunications services, but the Division has uncovered extensive fraud in this industry by criminals who took advantage of the program to enrich themselves. In total, the Division thus far has charged 12 corporations and 17 individuals with collusion and fraud affecting dozens of schools in 11 states. A total of six companies and ten

individuals have pled guilty, agreed to plead guilty, or entered civil settlements, and have paid or agreed to pay criminal fines and restitution totaling approximately $40 million and have been sentenced to more than 4,000 days in prison.

In addition, on September 14, 2007, a jury convicted a former sales representative of 22 counts of bid rigging, fraud, collusion, aiding and abetting, and conspiracy for her role in schemes to defraud the E-Rate program.

New York City Department of Education Contracting—A New York City Public School custodial engineer pleaded guilty in December 2006 to conspiring to commit mail fraud in connection with a kickback scheme used to defraud the New York City Department of Education and its predecessor, the Board of Education of the City of New York. Beginning in approximately July 1997 and continuing until at least June 2003, he received kickbacks in exchange for allocating contracts for industrial cleaning and maintenance supplies to companies associated with his two unnamed co-conspirators.

Merger Enforcement

Merger enforcement continues to be one of the Antitrust Division's core priorities. The Division is committed to challenging mergers that the evidence developed in a thorough investigation evaluated pursuant to rigorous economic analysis demonstrates will harm U.S. consumers and businesses. Six transactions were restructured or abandoned by the parties in response to a Division investigation, and the Division filed an additional four merger enforcement actions in district court in Fiscal Year 2007.

The Division has obtained divestitures or other relief to prevent harm to competition from mergers in important industries, such as telecommunications and

banking, among others. Additionally, in April 2006, the Division also obtained a settlement in which QUALCOMM Inc. and Flarion Inc. agreed to pay $1.8 million in civil penalties for violating premerger waiting period requirements.

A number of our most significant recent merger actions include the following:

Monsanto/Delta and Pine Land—After a thorough investigation of Monsanto's $1.5 billion proposed merger between Monsanto Co. and Delta and Pine Land Co. (DPL), the Division filed a lawsuit along with a consent decree that required Monsanto and DPL to divest a significant seed company, multiple cottonseed lines, and other valuable assets, in order to proceed with the merger. As originally proposed, the merger would have harmed farmers in cotton growing regions in the Mid-South and Southeastern U.S. by reducing competition in the sale of cottonseed that has been genetically modified to include desirable traits like insect resistance or herbicide resistance. DPL had worked with other biotech companies to develop cottonseed with traits that would compete with seed containing Monsanto's traits. The merger would have eliminated DPL as a non-Monsanto partner for these trait developers.

The Division's consent decree remedied the threat to competition by requiring that the merged firm: (1) divest Monsanto's Stoneville cottonseed business, which will be enhanced by other assets including germplasm from DPL; (2) divest to Syngenta DPL seed lines containing VipCot; and (3) permit trait licensees to stack Monsanto's traits with non-Monsanto traits. The proposed consent decree is being reviewed by the U.S. District Court in Washington, D.C., under the Tunney Act process.

Charleston JOA—Until 2004, the Daily Gazette Company and MediaNews operated within a joint operating agreement (JOA) and each owned a 50 percent interest

in an entity called Charleston Newspapers. The JOA performed many of the commercial functions of The Charleston Gazette and Daily Mail, the only two daily newspapers in Charleston, West Virginia. In May 2004, Daily Gazette Company acquired MediaNews' ownership interest in the JOA and ownership of the Daily Mail. As a result, Daily Gazette Company gained ownership of all of the assets and the ability to control all of the business operations of both newspapers.

The Division filed a civil antitrust lawsuit in May 2007 alleging that the Daily Gazette Company and MediaNews Group Inc. (MediaNews) violated the antitrust laws when they entered a series of transactions in May 2004 that resulted in the acquisition by Daily Gazette Company of the Daily Mail newspaper from MediaNews. The Division's complaint alleges that Daily Gazette Company, owner and publisher of The Charleston Gazette, bought the Daily Mail with the purpose and intent to shut it down, and began using its new control over that newspaper to initiate the termination of the second paper, but suspended those actions in December 2004 when the Division learned of the transactions and began an investigation. The Division's lawsuit seeks an order requiring the parties to undo their transactions and restore the competition that existed before May 2004.

Mittal Steel/Arcelor—In 2006, the Mittal Steel Company launched a hostile $33 billion takeover of Arcelor S.A., a transaction that would combine the world's two largest steel producers. In August 2006, the Division announced that it had concluded that Mittal's proposed acquisition of Arcelor would adversely affect competition in the $2 billion tin mill products market in the eastern United States by eliminating constraints on the ability of producers to coordinate their behavior and thereby increase the price of tin

mill products to can manufacturers and other customers. Tin mill products are finely rolled steel sheets that are normally coated with tin or chrome and used in many consumer-product applications, such as sanitary food cans and general line cans for aerosols, paints, and other products.

To remedy the Division's concerns, the proposed consent decree required Mittal to divest a steel mill that supplied tin mill products to the eastern United States. The court entered the consent decree in May 2007. The Division ultimately determined pursuant to the decree that Mittal must divest its Sparrows Point facility in Maryland, a profitable and diversified facility that has the capacity to produce more than 500,000 tons of tin mill products annually. That divestiture is proceeding.

Exelon/PSEG—In the energy industry, last year the Division investigated the proposed merger of Exelon Corporation and Public Service Enterprise Group Inc. The $16 billion merger would have combined the assets of two of the largest electricity generators in the mid-Atlantic region and would have created one of the largest electricity companies in the United States.

Huge variations in the marginal cost of running different kinds of generators affect the competitive dynamic in the wholesale market for electricity. The marginal costs of running a hydroelectric dam generator or nuclear power plant are substantially less than the marginal costs of running coal-fired steam turbine generators or gas-fired combustion turbine generators. The prevailing price in the market is determined by the least efficient plant necessary to meet demand. As a result, it is possible for an electricity company with a relatively small market share to have the incentive and ability to increase market prices due to the combination of generation plants it owns. In short, the company

might withhold output from selected higher-cost plants to drive up the market-clearing price, which would benefit its sales from its remaining lower-cost plants.

The Exelon/PSEG merger would have combined a firm that had significant low-cost nuclear and hydroelectric generating capacity (owned by Exelon) with a firm that had significant higher-cost coal-fired steam turbine capacity (owned by PSEG). The Division concluded that the combined firm would have significantly more incentive and ability to withhold output from selected high-cost plants than either firm had independently before the merger. Under the terms of a proposed consent decree, the merged firm would have been required to divest six electricity plants in Pennsylvania and New Jersey that provide more than 5,600 megawatts of generating capacity and that included key generating units in the mid-range of the fuel curve—units that often were on or near the margin and thus would have enhanced the ability of the merged firm to exercise market power. Exelon ultimately abandoned its effort to acquire PSEG.

Telecommunications—The telecommunications industry has kept the Division busy for many years, and the last few years have been no exception. The Division has recently investigated the mergers of Verizon and MCI, SBC and AT&T, the new AT&T and BellSouth, Sprint and Nextel, and Cingular and AT&T Wireless, among others. The Division took action to challenge portions of these transactions to protect competition, and decided not to challenge others after concluding that they were not likely to result in a substantial lessening of competition.

DFA/Southern Belle—After a victory in the court of appeals, the Division obtained a settlement negotiated on the eve of a district court trial that required Dairy Farmers of America Corp. (DFA) to divest its interest in Southern Belle Dairy Co. This

result successfully ended the Division's lawsuit challenging DFA's acquisition of a 50 percent interest in Southern Belle. The complaint charged that the partial acquisition reduced competition for school milk contracts in 100 school districts in Kentucky and Tennessee because it gave DFA significant partial ownership interests in two dairies—the Southern Belle dairy and the nearby Flav-O-Rich dairy—that competed against each other for such contracts. As a result, the acquisition reduced the number of independent bidders for school milk contracts from two to one in 45 school districts in eastern Kentucky, and from three bidders to two in 55 school districts in eastern Kentucky and Tennessee.

Merger Review Process and Transparency

Bringing enforcement actions is the most well-known aspect of the Division's merger activities, but it is not the only one. The Division also seeks continually to improve its merger review process and its merger enforcement transparency. Improving in these areas improves overall merger enforcement and benefits American consumers and businesses.

In December 2006, the Division announced a revision to its 2001 Merger Review Process Initiative. The Process Initiative helps us identify and devote increased resources to those transactions that should be challenged while at the same time spending fewer resources on transactions that are not anticompetitive. That is good government.

Thanks to the Hart-Scott-Rodino (HSR) premerger review process that Congress enacted in 1976, today most federal merger challenges occur before deals close, when effective injunctive relief is available, structural relief is more practical and effective, and

harm to consumer welfare has not yet occurred. The HSR Act gives the Antitrust Division and the FTC an opportunity to examine most large transactions before they close. Our goal is to identify quickly both transactions that threaten harm to competition and those that do not threaten competition, devoting our resources to challenging the former while letting the latter proceed.

Merger analysis itself has evolved significantly since the HSR Act was passed. There was a time when the Supreme Court affirmed decisions blocking mergers based largely on market share and a perceived unwritten guiding principle that the government always won. Times have changed. Courts have shifted their focus from a static analysis of market shares and concentration toward a fuller analysis of the future, dynamic competitive process in the relevant market. We certainly closely look at market shares and HHIs, but we also closely examine the competitive process for unilateral or coordinated effects, entry, and efficiencies as well. We frequently employ the increasingly sophisticated economic tools that have been developed by the antitrust community, such as regressions, merger simulations, diversion ratios, and critical loss analyses. While our advances in economic analysis can help us make better enforcement decisions, they often require significant quantities of data and information to conduct properly.

Consequently, the second request process can be costly and time consuming. Indeed, there has been an explosion in the volume of documents and information produced by parties in response to second requests. While there was a time when the production of a few hundred boxes of documents was a large production, now we talk in terms of gigabytes, terabytes, and millions of pages of documents. In the Verizon/MCI

and SBC/AT&T mergers, for example, the Division obtained approximately 25 million pages of documents.

Given the tremendous increases in review burdens on both the Antitrust Division staff and parties to proposed mergers, we seek ways to limit those burdens, while at the same time retaining our ability to effectively assess and challenge anticompetitive mergers. A significant step in that direction was the Division's 2001 Merger Review Process Initiative, which included means of improving our ability to identify those transactions that do not threaten harm to competition during the initial HSR waiting period without issuing a second request. The Initiative also provided means to improve the efficiency of our review process after a second request issues.

The Initiative worked. Notwithstanding the significant number of enforcement matters last year, the Division has improved its ability to close investigations of transactions that are not anticompetitive. After the Initiative was announced, for matters that did not lead to an enforcement action, the average number of days between the opening of a preliminary investigation and the closing of the investigation (either before or after issuance of a second request) fell from about 93 days to 57 days. The average length of second request investigations dropped from 213 days for the two years before the Initiative to 154 days, a drop of over 25 percent.

While the 2001 Initiative has resulted in investigations that are more focused and efficient, it was clear that improvements could still be made. Therefore, the Division announced last December a number of significant refinements that build on the successes of the 2001 Initiative. Many of the changes formally adopt merger investigation procedures already successfully used by Antitrust Division staff, such as commonly used

second request modifications and a revised Model Second Request that accounts for problems that have arisen in past investigations.

We are committed to continued improvements in the merger review process. At the same time, we will not forgo getting the information we need to successfully challenge anticompetitive mergers. If we proceed to a judicial challenge, the courts expect the Division to present a thorough and detailed empirical analysis of a challenged merger's likely anticompetitive effects, and they expect us to do so promptly after the complaint is filed. We fully intend to meet that expectation to protect U.S. consumers and businesses from anticompetitive mergers.

I would now like to turn to the issue of transparency. Transparency is readily achieved when the Division brings an enforcement action. Theories and evidence of anticompetitive harm are available to the public through complaints, press releases, and competitive impact statements. The public often has as much, if not greater, interest, however, in why the Division decides not to bring an enforcement action in particular cases. While confidentiality restrictions place significant limits on what the Division may say publicly about its HSR investigations, we have been active and intend to remain active in issuing closing statements in mergers that we do not challenge after extensive investigations. These statements describe our rationale for the enforcement decision within confidentiality limits. Thus, for example, we issued closing statements detailing our rationales for not challenging the AT&T/Bellsouth and Maytag/Whirlpool mergers. We will continue to do so where appropriate to help the public better understand our actions.

The Division's transparency efforts also have included the release of a joint DOJ/FTC Commentary on the Horizontal Merger Guidelines in March 2006. The Commentary is the latest chapter in the agencies' ongoing efforts to provide guidance to the antitrust bar and businesses regarding how the agencies enforce Section 7 of the Clayton Act.

The analytical framework and standards used to analyze the likely competitive effects of mergers are embodied in the Horizontal Merger Guidelines, which the Division and the FTC jointly issued in 1992 and revised in 1997. The Commentary, which is available on both agencies' websites, explains how the Division and the FTC have applied particular guidelines provisions relating to market definition, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Included throughout the Commentary are summaries of actual mergers that the agencies analyzed under the Merger Guidelines.

Civil Non-Merger Conduct

Civil non-merger enforcement is based on anticompetitive conduct under the Sherman Act. Although it can involve unreasonable restraints of trade under Section 1 of the Sherman Act, it more frequently implicates single-firm conduct under Section 2 of the Sherman Act. Enforcement of Section 2 of the Sherman Act presents some of the most difficult challenges in antitrust law today. An important part of the Division's mission is to advance development of antitrust law in procompetitive ways. Sound antitrust enforcement policy requires prosecution of exclusionary conduct that reduces

output and increases prices while at the same time striving to avoid condemnations that chill procompetitive behavior.

Determining when unilateral conduct is unlawful under Section 2 has proven difficult because the aggressive, unilateral behavior typically at issue in Section 2 cases often resembles the healthy, aggressive competition that the antitrust laws seek to promote. The antitrust laws should encourage vigorous competition—even by companies with a large share of the relevant market. Because the current state of the law does not always define clearly what is lawful and what is not, uncertainty can chill procompetitive behavior while undermining deterrence of anticompetitive conduct. For this reason, the Antitrust Division, in conjunction with the FTC, conducted hearings to help advance our own thinking about unilateral conduct, better inform our judgment about when it is appropriate for the United States to bring enforcement actions under Section 2 of the Sherman Act, and help us to develop clear and objective standards that will apply in Section 2 matters. During 18 days of hearings, spanning over 11 months and concluding in May 2007, the Division and the FTC received submissions and heard from 28 different panels and 130 panelists.

A number of prominent practitioners and economists participated in these hearings, and the Antitrust Division is grateful to them for agreeing to share their insights. We also received important participation from the business community, consumer groups, and business historians. The hearings focused on predatory pricing, predatory buying, refusals to deal, tying, exclusive dealing, bundled loyalty and market share discounts, misleading and deceptive practices, market definition and market power, and remedies. There were also hearings on foreign antitrust enforcement, empirical

studies, business history and strategy, and business and academic perspectives on single-firm conduct.

Hearings are an important tool for increasing our enforcement capacity in the area of civil non-merger enforcement—an area where the law is less clear, and where it is more difficult to discern whether aggressive competitive behavior harms competition—but it is also important to bring appropriate enforcement action when the antitrust laws are violated. We have been active in bringing enforcement action in the civil non-merger area in the past year. Some of our most recent significant enforcement efforts in this area include:

Real Estate Services—The Division's enforcement against anticompetitive agreements included its extensive efforts to stop anticompetitive practices in the real estate services industry, including its lawsuit against the National Association of Realtors (NAR). For many people, the purchase or sale of a home not only represents the fulfillment of the American dream but is their single most significant personal financial transaction. The Division has focused its enforcement activities to ensure that the industry and consumers can take advantage of newer business models. In addition, the Division, often in collaboration with the FTC, has vigorously pursued competition advocacy efforts by commenting on the detrimental competitive effects of various legislative and regulatory proposals that limit competitive alternatives at the state level. I will discuss these efforts in greater detail later on.

In September 2005, the Division filed suit after NAR promulgated rules that would limit competition from real estate brokers who use the Internet to serve their customers. (I am recused from this matter.) The lawsuit alleges that NAR's policy

prevents consumers from receiving the full benefits of competition and threatens to lock in outmoded business models and discourage discounting. In November 2006, a U.S. District Court denied NAR's motion to dismiss. The lawsuit is now in the discovery phase.

Cable Entry into Telecommunications Services—Blue Ridge and Service Electric requested authority for their telephone affiliates to provide local telecommunications services in Commonwealth Telephone Enterprises' rural telephone service area. The entry of Blue Ridge and Service Electric presented the first opportunity for widespread residential competition in that area, and Commonwealth filed protests regarding the requests before the Pennsylvania Public Utility Commission. In 2006, Commonwealth entered into settlement agreements with Blue Ridge and Service Electric, obtaining terms that restricted the geographic scope of the companies' entry in exchange for agreeing to withdraw the protests against certification.

The Division informed Commonwealth of its competitive concerns about these settlements in early 2007. In response to the Division's concerns, the settlement agreements with Blue Ridge and Service Electric were amended to remove the restrictions imposed on their entry.

Federation of Physicians and Dentists—The Federation of Physicians and Dentists coordinated its approximately 120 Cincinnati-area OB-GYN member physicians, who constitute a large percentage of Cincinnati-area OB-GYNs, to negotiate or renegotiate higher fees in their contracts with Cincinnati-area healthcare insurers. The Federation, with substantial assistance from three physicians, allegedly helped implement its

members' concerted demands to insurers for higher fees and more favorable related terms, demands which were accompanied by threats of contract terminations.

The Division filed an antitrust lawsuit against the Federation, one of its employees, and the three physicians, alleging that their actions caused Cincinnati-area health care insurers to raise fees paid to the Federation's OB-GYN members above the levels that the OB-GYNs likely would have obtained if they had negotiated competitively with those insurers. The Federation and its employee settled the charges against them in June 2007. (The three physicians settled earlier.)

Bristol-Myers Squibb—In May 2007, Bristol-Myers Squibb Company (BMS) agreed to plead guilty and pay a $1 million criminal fine for lying to the federal government about a patent deal involving Plavix, the most widely prescribed blood-thinning drug in the world. Approximately 48 million Americans take Plavix daily to prevent potentially fatal blood clots.

In 2006, BMS and another company, Apotex Inc., were engaged in litigation over the validity of the patent for Plavix and were negotiating a settlement of that litigation. At the time, BMS was subject to a separate consent decree for unrelated conduct with the Federal Trade Commission (FTC) that required BMS to submit any proposed patent settlements for review and approval by the FTC. The FTC warned BMS that it would not approve a settlement of the Plavix litigation if BMS agreed not to launch its own generic version of Plavix that would compete against Apotex for generic sales. A former senior BMS executive made oral representations to Apotex with the purpose of causing Apotex to conclude that BMS would not launch its own generic version of Plavix in the event that the parties reached a final settlement agreement. The Division further alleged that

these representations ultimately resulted in an understanding between BMS and Apotex that BMS would not launch its own generic version of Plavix. Finally, the Division charged that BMS took steps deliberately to mislead the FTC by first concealing and then later lying about the existence of its representations to and understanding with Apotex Inc.

BMS agreed to plead guilty to two violations of the federal False Statements Act and to pay a fine of $1 million—the maximum fine permitted for these violations by statute.

Arizona Hospital and Healthcare Association—In May 2007, the Division reached a settlement in a lawsuit against the Arizona Hospital and Healthcare Association and its subsidiary, AzHHA Service Corporation, which controls the AzHHA Registry, a group purchasing organization for temporary nursing services. The lawsuit challenged actions by the parties that caused the bill rates paid to agencies, and ultimately the wages paid to temporary nurses in Arizona, to stagnate and fall below competitive levels. The settlement prohibits AzHHA and its member hospitals from agreeing on competitively sensitive contract terms, including uniform bill rates paid to nurse staffing agencies. The proposed settlement also prevents AzHHA from boycotting or discriminating against agencies or hospitals that choose not to participate in the AzHHA Registry.

Competition Advocacy

In addition to its law enforcement role, the Antitrust Division regularly seeks to promote competition through broader advocacy efforts. Competition advocacy includes providing advice and analysis concerning a variety of matters, such as Supreme Court

cases, international efforts, and legislation and regulation at both the federal and state levels. Anticompetitive constraints imposed by government action can have a much broader negative impact on consumers than any single cartel or merger—potentially affecting entire sectors of the economy—but are generally exempt from direct challenge under the antitrust laws. Moreover, governmentally-imposed restraints are likely to be more durable than private restraints because market forces are less likely to overcome them. The Division believes that robust competition advocacy is an important part of our mission to protect competition on behalf of American consumers.

International: The Division is focused and active on the international front. With more and more countries adopting antitrust enforcement regimes, the Antitrust Division has made a priority of strengthening international cooperation and promoting antitrust policy convergence. In the last year, the Division pursued these goals by continuing to work closely with multilateral organizations around the world, and by working to develop and maintain strong bilateral relationships with enforcement agencies in other countries.

Two organizations stand out for their recent work in achieving consensus on important antitrust issues: the International Competition Network (ICN), which the Division and the FTC helped to launch in 2001, and the Organization for Economic Cooperation and Development (OECD).

The ICN provides an opportunity for senior antitrust officials and non-governmental advisors, from both developed and developing countries, to work together to achieve practical improvements in international antitrust enforcement. In just over five years, the ICN has grown from 14 founding members into a global network of 100

members from 88 jurisdictions. At the Moscow ICN conference in May 2007, under the Division's leadership as chair of the Merger Working Group, the ICN began work on substantive merger policies. In 2006, the Division was heavily involved in the ICN's Unilateral Conduct Working Group, which the FTC co-chairs. The working group announced plans to focus on the objectives of single-firm enforcement and the standards for analysis of dominance (monopoly power).

The OECD's 30 member countries share a commitment to democratic government and market-based economies, and the OECD provides an effective forum for governments to seek answers to common problems, identify best practices, and coordinate policies. The Division has been closely involved in all phases of the OECD's competition work. Since 2006, I have chaired the OECD's Competition Committee Working Party on International Cooperation and Enforcement, where, among other work, I led roundtables on issues affecting all three major areas of antitrust enforcement: cartels, merger review, and unilateral conduct.

The Division remains committed to developing strong, productive bilateral relationships with its foreign counterparts. Working productively with the European Commission remains a priority, and the Division continues to work closely with its counterpart in Brussels on a wide range of cartel, merger, and other enforcement and policy matters. For example, in February 2006, the Division confirmed publicly that it was coordinating with the EC and other foreign competition authorities in investigating potentially anticompetitive practices in the air cargo industry. The Division also attended numerous meetings with its sister agencies in the governments of United States trading partners, such as Japan and Korea. Further, U.S., Canadian, and Mexican agencies

created working groups on unilateral conduct and intellectual property. The Division will continue to promote sound antitrust analysis and international cooperation abroad.

We have devoted special attention to China in recent years. The Division followed closely China's efforts to enact its first comprehensive antitrust law, and on August 30, 2007, the Chinese legislature passed the new Antitrust Act (ATA), which will become effective on August 1, 2008. The Division has provided comments on several draft versions of the ATA and met with relevant Chinese Government officials periodically to discuss the draft law in detail.

The Chinese demonstrated a willingness to listen to our concerns and, through several revisions, addressed some potential problems in draft versions of the ATA. We also believe that implementation of the law after it is passed is extremely important. The statute necessarily sets forth general principles and leaves significant portions of the analysis to be developed through individual cases and/or regulations. Accordingly, we have already begun discussing with Chinese officials how we can help in the implementation phase of their antitrust regime.

On the domestic front, the U.S. Supreme Court has taken an active docket of antitrust and competition-related cases in the past year, and the Division has assisted the Solicitor General in submitting the views of the United States as *amicus curiae*. In 2006, the court issued decisions in *Texaco Inc. v. Dagher*, stating that "rule of reason" analysis generally governs pricing decisions by joint venturers; *Illinois Tool Works Inc. v. Independent Ink, Inc.*, holding that the mere fact that a tying product is patented does not support a presumption of market power for purposes of antitrust tying analysis; and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc*., clarifying the standards for

secondary-line price discrimination claims under the Robinson-Patman Act. In each case, the Court reached the conclusion urged by the United States.

Later in 2006, the Division assisted in briefs filed in *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co., Inc.*, regarding the standards governing buyer-side predatory pricing. The Supreme Court issued a unanimous decision in February 2007, consistent with the United States' position. The Division also assisted in briefs filed in *Bell Atlantic Corp. v. Twombly*, concerning pleading standards for antitrust civil conspiracy claims, resulting in a 7-2 decision consistent with the government's amicus brief; in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, on the question of whether vertical minimum price maintenance agreements should be evaluated under the rule of reason, resulting in a 5-4 decision consistent with the government's amicus brief; and *Credit Suisse First Boston Ltd. v. Billing*, considering the test for implied immunity from the antitrust laws based on the operation of securities regulations and statutes. The Supreme Court held that in the particular circumstances at issue a "serious conflict" between application of the antitrust laws and proper enforcement of the securities law required implied antitrust immunity. The Court nevertheless reaffirmed the basic principle that "an implied repeal of the antitrust laws" should "be found only where there is a plain repugnancy between the antitrust and regulatory provisions."

The Division, together with the FTC, also educates policymakers and the general public about the benefits of competition in a variety of markets. One market we have devoted substantial efforts to is the real estate market. The Division provides assistance and information to entities considering rules—such as rules that prohibit rebates to

consumers or that undermine online brokerage models—that would inhibit some types of competition that can lower the cost of buying or selling a home.

During 2006, several states modified proposed or existing laws and regulations to enhance competition to the benefit of consumers. Delaware, Ohio, Tennessee, and Wisconsin all passed bills that included a waiver provision to enable individual consumers to choose not to purchase unwanted types of real estate brokerage services. The West Virginia Real Estate Commission, the Tennessee Real Estate Commission, the Kentucky Real Estate Commission, the South Dakota Real Estate Commission, and the State of South Carolina all lifted bans on consumer rebates and other inducements to consumers in real estate transactions. The result is that consumers in these states now have the potential to save thousands of dollars on the purchase of a home.

The Division is also engaged in a broader effort to ensure that all American consumers will continue to benefit from competition in the real estate services industry. A well-attended workshop in October 2005, jointly sponsored by the Antitrust Division and the FTC, was a key part of that effort. Participants from brokerage firms, NAR, local realtor associations, fee-for-service and internet referral brokers, and buyers' brokers spotlighted the competitive issues facing this industry. The Division will continue to maintain its enforcement and advocacy efforts in this area to ensure that consumers enjoy the benefits of better service, increased choice, and lower prices resulting from competition.

The Division also joined with the Federal Trade Commission in April 2007 to issue a report, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," to inform consumers, businesses, and intellectual property

rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property. The report discusses issues including refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration. This report is an important example of our efforts to increase the transparency of our enforcement decisions and to advance the state of knowledge on the intersection of antitrust and intellectual property rights.

Conclusion

I emphasize in closing that none of what I have discussed could have been accomplished without the dedicated career staff of the Antitrust Division. It is because of their experience, talent, and dedication to the mission of protecting consumers that we have been able to achieve the successes we have. It is an honor and privilege to serve with them.

Given the important role we assign to competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our laws. While I am pleased with all that we have accomplished thus far, I recognize that the hallmark of any successful organization is the continuing desire to improve. In that regard I look forward to working with the members of this Task Force and your respective staff.

Mr. Chairman, that completes my prepared remarks. I would be pleased to respond to questions at this time.